Supreme Court of the United States

October Term, 1978

No. 78-909

CITY OF CINCINNATI, OHIO,
Petitioner,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO,
THE CINCINNATI GAS & ELECTRIC COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT

BRIEF OF RESPONDENT THE CINCINNATI GAS & ELECTRIC COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether two applications for increases in rates for natural gas service provided in areas served by respondent The Cincinnati Gas & Electric Company outside the corporate limits of the City of Cincinnati and a third application for increases in rates for natural gas service by The Cincinnati Gas & Electric Company to customers residing within Cincinnati were mutually exclusive, thereby pro-

hibiting the Ohio Public Utilities Commission from rendering a decision on the former two applications prior to reaching a decision on the third under the principle enunciated in *Ashbacker Radio Corp. v. FCC,* 326 U.S. 327 (1945).

COUNTER STATEMENT OF THE CASE

Over the years respondent The Cincinnati Gas & Electric Company (hereinafter "CG&E") has followed a practice of negotiating ordinance rate contracts, setting rates for gas and electric service, with many municipalities throughout its service area, pursuant to Article XVIII, Sections 4 and 5, of the Ohio Constitution (Respondent PUCO's App., p. 18). With respect to some other municipalities and unincorporated areas, its rates have been set by the Public Utilities Commission pursuant to Ohio Revised Code, Section 4909.18 *et seq.* (Petitioner's App. H, pp. 94a-97a). Owing to variables in the negotiating process and to differing ordinance dates, CG&E's rates for the same kind and class of service varied widely throughout its service territory. As a consequence, prior to the relevant proceedings below, CG&E had in effect six tariff schedules for natural gas service, varying in amounts solely by reason of political boundaries.

In September, 1974, CG&E filed an application with the Commission, styled Case No. 78-581-GA-AIR, for an increase in rates for gas service to customers in those territories that had previously been subject to the Commission's jurisdiction (*i.e.*, where ordinance contracts had not been or could not, under Ohio law, be negotiated). Subsequently, on March 25, 1975, CG&E filed Case No. 75-205-GA-AIR for an increase in certain rates for service to customers in the City of Cincinnati, rates previously fixed by ordinance contract. Finally, in August, 1975, CG&E filed a third application, styled Case No. 75-641-GA-AIR, for an increase in rates to customers in some sixty-three municipalities, rates previously fixed by municipal ordinances. The three cases together covered all of CG&E's retail natural gas sales.[1]

Petitioner, the City of Cincinnati (hereinafter the "City"), petitioned the Commission for leave to intervene in Case No. 75-205-GA-AIR (hereinafter the "in-City application") only (Respondent PUCO's App., pp. 21-23), and that petition was granted by the Commission (Respondent PUCO's App., pp. 24-25). By an entry dated June 9, 1976, the Commission consolidated the three applications for purposes of public hearing, and set July 12, 1976, as the date for that hearing (Petitioner's App. I, pp. 99a-102a).

Prior to the public hearing and during the course of the proceedings, discussions were held between the parties with respect to possible stipulation of all or some of the issues and settlement. Contrary to the City's contention (Petition, p. 6 n.6), those discussions were *not* without notice to the City. The City was invited, at the earliest opportunity, to participate but declined. Eventually CG&E, the Commission's Staff, and all other parties participating in Cases Nos. 74-581-GA-AIR and 75-651-GA-AIR (hereinafter the "out-of-City applications") were able to reach agreement and to submit a recommendation to the Commission that, if accepted, would dispose of those cases in their entirety. Consequently, a motion to sever was

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1. Although it is convenient to distinguish these cases in terms of municipalities, it should be noted that No. 74-581-GA-AIR actually included certain customer classes throughout CG&E's entire service area. Historically, service to these customers, principally industrial users, had not been regulated by ordinance, even where other service in a particular municipality had been so regulated.

made, and was subsequently granted by an Opinion and Order of the Commission entered on July 23, 1976 (Petitioner's App. D, pp. 39a-64a). That Order approved the tendered recommendation and settlement agreement and rejected a number of arguments raised by the City, including the arguments raised in this petition.[2] Hearings continued on the in-City application and an Opinion and Order in that case was issued on September 8, 1976 (Petitioner's App. E, pp. 65a-84a).

The City filed an application for rehearing on the out-of-City applications, which the Commission denied by Order dated September 15, 1976 (Petitioner's App. F, pp. 85a-88a). The Commission likewise denied the City's application for rehearing on the in-City application (Petitioner's App. G, pp. 89a-97a).

The City then appealed to the Ohio Supreme Court from the Commission's Orders on both the in-City application and the out-of-City applications. Those appeals were heard together, and the Court affirmed both of the Orders appealed from. 55 Ohio St. 2d 168, 378 N.E.2d 729 (Petitioner's App. A and B, pp. 1a-37a). Among the arguments raised by the City and rejected by the Ohio Supreme Court were the same arguments made in the instant petition. The City's motion for rehearing was also denied (Petitioner's App. C, p. 38a).

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2. The petitioner does not dispute, nor can it, that the Commission was required by Ohio law to decide the in-City application on its own record, notwithstanding the Commission's entry of an Order disposing of the out-of-City applications with which it had been consolidated. *See Lopresti v. Community Traction Co.*, 160 Ohio St. 480, 483, 117 N.E.2d 2, 4 (1954); *Transcom Builders, Inc. v. Lorain*, 49 Ohio App. 2d 145, 149-50, 359 N.E.2d 715, 718-19 (Lorain County 1976). CG&E, therefore by agreeing to the settlement on the out-of-City applications despite the City's refusal to settle on the in-City application, bore the risk that it would not have a uniform rate throughout its service area if the record on the in-City application did not support the establishment of rates in the City at the "uniform" level.

REASONS FOR DENYING THE WRIT

THE ONLY QUESTION RAISED BY THE PETITION IS FACTUAL IN NATURE, HAS NO IMPORTANCE OTHER THAN TO THE PARTIES TO THE PROCEEDING BELOW, AND WAS CORRECTLY DECIDED BY THE OHIO SUPREME COURT.

Petitioner the City of Cincinnati ("City") argues that the Ohio Public Utilities Commission denied it due process of law by entering a decision on two applications for natural gas rate increases filed by respondent The Cincinnati Gas & Electric Company ("CG&E") for areas served by CG&E outside the City while reserving CG&E's application for natural gas rate increases to customers within the City for later decision. Citing this Court's decision in *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945), the City maintains that the three applications at issue were "mutually exclusive" and that the Commission's decision on the two out-of-City applications rendered its subsequent hearing on the in-City application an "empty thing."

Pursuant to the *Ashbacker* doctrine, in a factual situation where the nature of two applications are such that the granting of one of the applications as a practical matter effectively precludes the granting of the other, the body ruling on the competing applications must decide their merits at the same time. *Ashbacker Radio Corp. v. FCC*, *supra*, 326 U.S. at 330. The *fact* of mutual exclusivity between applications is prerequisite to the applicability of *Ashbacker*. *Id.* at 333; *Washington Utilities and Transportation Comm'n v. FCC*, 513 F.2d 1142, 1165-66 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975); *Delta Air Lines*,

Inc. v. CAB, 497 F.2d 608, 614 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 930 (1974). Where such mutual exclusivity is absent, there is no requirement of a consolidated or comparative hearing on the applications. *B. J. McAdams, Inc. v. ICC*, 551 F.2d 1112, 1115 n.4 (8th Cir. 1977); *Great Western Packers Express, Inc. v. ICC*, 263 F. Supp. 347, 350-51 (D. Colo. 1966).

The City is asking this Court to review the *factual* determination made by the Ohio Supreme Court that the three applications at issue were not mutually exclusive. The Ohio Supreme Court based its decision on the City's *Ashbacker* claim on the absence of mutual exclusivity.

> "We do not find, however, that the *Ashbacker* doctrine applies to the instant cause. Under the facts of the *Ashbacker* case, the grant of one station's radio broadcasting application meant the *automatic denial* of the second station's license request. The two applications were mutually exclusive. In the instant cause, the commission's grant of one rate outside the City did not preclude the possibility of a different rate inside the city." *Cinncinnati v. Public Utilities Comm'n*, 55 Ohio St. 2d 168, 170-71, 378 N.E.2d 729, 731-32 (1978) (Petitioner's App. A, p. 4a; App. B, p. 23a) (emphasis by the Court).

Certiorari is customarily not granted to review factual determinations made by lower courts. *E.g., Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508, 509 (1924). With respect to the particular factual determination germane here, mutual exclusivity of applications, in the thirty-three years since *Ashbacker*, this Court has never issued an opinion addressing the question of whether applications were or were not mutually exclusive in the *Ashbacker* sense, and, as late as

1974, denied a petition for writ of certiorari raising such a question. *Delta Air Lines, Inc. v. CAB*, 497 F.2d 608, 614 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 930 (1974).[3] The instant petition should likewise be denied.

The nature of the City's mutual exclusivity argument further militates against the granting of the writ. The City does not contend that the Commission was required to reach the decision that it did on the in-City application by force of law or because of the impact of its prior decision on the out-of-City applications upon the facts relevant to the in-City application. Rather the City argues that mutual exclusivity should be presumed because the record on the in-City application does not contain substantial evidence to support the Commission's decision and because that decision is consistent with the prior one entered on the out-of-City applications.[4] As a prerequisite to resolving the question of mutual exclusivity, therefore, this Court would have to address the question of whether the record contained substantial evidence supporting the challenged rate decision, a question not only inappropriate for review on certiorari but also of no importance to anyone but the parties to the proceeding below.

The Ohio Supreme Court correctly decided that after entering a decision on the out-of-City applications, the Commission was free to decide the in-City application on its own record, and that substantial evidence on the record supported the Commission's decision on the in-City

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3. The question presented by the petition in *Delta Air Lines, Inc. v. CAB, supra*, is stated in 42 U.S.L.W. 3534 (March 17, 1974).

4. This respondent is aware of no authority supporting petitioner's contention that where two applications are not mutually exclusive in the *Ashbacker* sense, by their nature, mutual exclusivity may nevertheless be presumed from the decisions on the merits of those applications, nor does the authority cited by the petitioner support that contention.

application. 55 Ohio St. 2d at 170-71, 378 N.E.2d at 729, 731-32 (Petitioner's App. A, pp. 4a-5a; App. B, pp. 23a-24a). Accordingly, the instant petition should be denied.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be denied.

Respectfully submitted,

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